Supreme Court, U.S.
FILED

95 16 48 JAN 29 1996

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. MURPHY, JR.
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500

Attorney for Petitioner
Brian Wechsler

April 12, 1996

Washington, D.C. • THIEL PRESS • (202) 328-3286

340

QUESTIONS PRESENTED FOR REVIEW

A. Did Mr. Wechsler retain a reasonable expectation of privacy in his checked and locked luggage under the Fourth and Fourteenth Amendments to the United States Constitution by retaining his luggage key and baggage claim tickets, equivocating about whether he had checked luggage, and insisting that the agents not search the luggage without a warrant?

B. Before being searched, was Mr. Wechsler unlawfully detained in violation of the Fourth Amendment and Fourteenth Amendments to the United States Constitution when, as Mr. Wechsler was leaving the airport and entering a taxi, the agent thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority, told Mr. Wechsler he was a DEA agent and said he wished to ask him some questions?

PARTIES TO THE PROCEEDINGS

PETITIONER

BRIAN WECHSLER

RESPONDENT

COMMONWEALTH OF VIRGINIA

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	25

APPENDICES:

Appendix A - Opinion, Court of Appeals of Virginia, #1661-93-4, dated April 11, 1995	1a
Appendix B - Order, Supreme Court of Virginia, #95-1220, dated October 30, 1995	3a

TABLE OF AUTHORITIES

Cases	Page
Commonwealth v. Holloway, 9 Va. App. 11, 384 S.E.2d 99	14, 18, 23
Florida v. Royer, 460 U.S.491 (1983)	19
Moss v. Commonwealth, 7 Va. App. 305, 307, 373 S.E.2d 170 (1988)	20
Reid v. Georgia, 448 U.S.438 (1980)	21, 24
Taylor v. Commonwealth, 6 Va. App. 384, 369 S.E.2d 423 (1988)	23
Terry v. Ohio, 392 U.S.1, 16 (1967)	18
United States v. Barry, 853 F.2d 1479 (8th Cir. 1988)	13
United States v. Goodina, 695 F.2d 78 (4th Cir. 1982)	19
United States v. Moskowitz, 883 F.2d 1142 (2nd Cir. 1989)	15
United States v. Oswald, 783 F.2d 663 (6th Cir. 1986)	11

United States v. Presler, 610 F.2d 1206 (4th Cir. 1979)..... 13

United States v. Sanders, 719 F.2d 882 (6th Cir. 1983)..... 12, 17

United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990)..... 22

United States v. Wilson, 953 F.2d 116 (4th Cir. 1991)..... 19

Woodson v. Commonwealth, 14 Va. App. 787, 421 S.E.2d 1 (1992)..... 20

No. _____

In The

Supreme Court of the United States

October Term, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition For a Writ of Certiorari To The

Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia entered in this case on October 30, 1995.

OPINIONS BELOW

Petitioner Brian Wechsler's ("Mr. Wechsler's") conviction was affirmed in *Commonwealth v. Wechsler*, ___ Va. App.___, 455 S.E.2d 744 (#1661-93-4, April 11, 1995) (Appendix A); and Mr. Wechsler's petition for appeal to the Supreme Court of Virginia was denied by order dated October 30, 1995 (#951220) (Appendix B).

JURISDICTION

The judgment of the Supreme Court of Virginia denying Mr. Wechsler's petition for appeal was entered October 30, 1995; and the jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution, which says in pertinent part: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated;" and the Fourteenth Amendment to the United States Constitution, which says in pertinent part: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Brian Wechsler was arrested at Washington National Airport and charged with possession of marijuana with intent to distribute in violation of Virginia Code § 18.2 - 248.1 and transportation of marijuana into the Commonwealth in violation of Virginia Code § 18.2 - 248.01. On March 18, 1993, a pretrial hearing was held in the Circuit Court of Arlington County on Mr. Wechsler's motion to suppress the evidence seized from his luggage. Mr. Wechsler argued, *inter alia*, that he had been illegally seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution and that the warrantless search of his luggage violated the Fourth and Fourteenth Amendments of the United States Constitution. The Circuit Court denied Mr. Wechsler's motion to suppress, holding, *inter alia*, that he had been legally seized and that he had abandoned his luggage. (J.A.1 124 - 25).[1] After hearing argument on Mr. Wechsler's motion for reconsideration on July

[1]Record of citations are to the Joint Appendix ("J.A.") originally filed in the Court of Appeals of Virginia.

16, 1993, the Circuit Court denied that motion. The court did, however, observe that "[i]t's a troublesome case" and that "[a] lot of judges could disagree with that result reasonably." (J.A.150, 166).

On July 26, 1993, Mr. Wechsler entered a conditional plea of guilty on both charges in the Circuit Court of Arlington County. Mr. Wechsler was sentenced on each charge to a term of imprisonment of twenty years, five years were suspended, a six - month driver's license suspension, and a suspended fine of $100.00. The sentences were imposed concurrently. The Circuit Court continued Mr. Wechsler's bond pending appeal. Mr. Wechsler timely filed his Notice of Appeal in the Court of Appeals on August 23, 1993.

Mr. Wechsler's petition for appeal to the Court of Appeals was granted without oral argument. Briefs raising these issues were filed and oral argument on these issues was heard before Judges Willis, Bray and Fitzpatrick. Mr. Wechsler's conviction was affirmed in a published decision written by Judge Bray, filed on April 11, 1995. On May 10, 1995, Mr. Wechsler's bond pending appeal was revoked and he is

currently serving his sentence at the Coffeewood Correctional Center in Mitchells, Virginia.

Mr. Wechsler's petition for rehearing and for rehearing *en banc* was denied by the Court of Appeals on June 2, 1995; and his petition for appeal to the Supreme Court of Virginia, which raised only the search issue, was denied on August 29, 1995. This petition for writ of certiorari was filed in this court on January 29, 1996.

STATEMENT OF THE FACTS

On the morning of November 13, 1992, a law enforcement officer assigned to the Dallas - Fort Worth Airport telephoned Drug Enforcement ("DEA") Agent Douglas Kahn and reported information regarding an airline passenger. According to the Dallas - Fort Worth officer, a young black male named Brian Wechsler had purchased a one - way ticket from Tucson, Arizona to Washington National Airport. They were suspicious of Mr. Wechsler because he reportedly made his reservations by phone about one hour prior to the scheduled boarding time. Shortly before departure, he arrived at the airport, paid cash for his ticket and checked two pieces of luggage. (J.A. 20 - 21). The officer at the Dallas - Fort Worth

Airport reportedly observed a black male who may have been the above - described person and who appeared nervous during the layover in Dallas - Fort Worth. (J.A. 20 - 21).

Based solely upon this information, a team of DEA agents proceeded to Washington National Airport. Agents Kahn and Jacobson stationed themselves at the gate and observed a young black male, Mr. Wechsler, deplaning with two carry - on bags. (J.A. 80). According to Agent Kahn, when Wechsler noticed the agents -- two casually dressed Caucasian males -- staring at him, he looked away, and he continued walking in the direction of the baggage carousel. (J.A. 24 - 25, 80). The agents then followed Mr. Wechsler. Mr. Wechsler stopped briefly in the vicinity of the baggage carousel and, according to Agent Kahn, again looked at the plainclothed agents as they followed him. (J.A. 27). Mr. Wechsler went to a pay phone and attempted to make a call; he then exited the airport and proceeded to a taxi cab stand. (J.A 28 - 29).

When it was his turn, Mr. Wechsler opened the taxi cab door and placed one bag in the taxi. As Mr. Wechsler was entering, Agent Kahn thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority.

(J.A. 106 - 107). Agent Kahn told Mr. Wechsler that he was a DEA agent and wished to ask him some questions. (J.A. 30, 106). In response to the agent's curbside interrogation, Mr. Wechsler said he had discarded his airline ticket and denied having any luggage other than his two carry - on bags. Mr. Wechsler also produced a valid Maryland driver's license in his true name. When asked whether he was in possession of any narcotics or large amounts of money, Mr. Wechsler stated that he was not.

Agent Kahn then asked to search Mr. Wechsler's carry - on bags. Once again, Mr. Wechsler acquiesced. (J.A. 31 - 32). Examination of the bags produced Mr. Wechsler's airline ticket, two baggage claim tickets, two pipes, and some clearly - labeled, commercially - sold "Smoking Herb." (J.A. 40, 60 - 61). When Agent Jacobson found the airline ticket and the baggage claim tickets, at that point Agent Jacobson asked Mr. Wechsler, "I didn't think you had checked baggage." Mr. Wechsler said, "Well, I guess I do." (J.A. 36, 84) (emphasis added). Both the airline ticket and the matching claim tickets carried the name Brian Wechsler -- Mr. Wechsler was traveling under his own name. (J.A. 57). At that point, Mr. Wechsler

indicated that he wanted to leave. (J.A. 84). The agents then formally detained Mr. Wechsler ostensibly in order to field test the commercially packaged "smoking herb" which the agent did not even bother to smell. (J.A. 36, 60).[2]

The Circuit Court held that it was unnecessary to consider the lawfulness of the detention or the subsequent interrogation because Mr. Wechsler had already abandoned his luggage by this time. The following section describes the post-detention events which, nonetheless, troubled the Circuit Court. (J.A. 124, 127).

The agents took Mr. Wechsler to the airport's police substation and placed him in an interview room. The agents searched Mr. Wechsler's person and field tested the "Smoking Herb." The field test and further observation conclusively proved that the "Smoking Herb" was in fact a smoking herb and not marijuana. (J.A. 34 - 37). Mr.

---

[2]The Commonwealth qualified Agent Kahn as an expert in narcotics and he testified that the "smoking herb" could easily nave been distinguished from marijuana upon an olfactory examination. (J.A. 16, 60).

Wechsler was not released. Instead, Agent Kahn left the interview room and contacted an Assistant United States Attorney for instructions.

Meanwhile, Agent Jacobson, without giving Miranda warnings, continued interrogating Mr. Wechsler regarding the baggage claim tickets. (J.A. 38 - 42, 86). Agent Jacobson asked Mr. Wechsler "if he did have luggage, he said no, he didn't have any baggage. I said -- right after I asked him that I said what does your baggage look like, and he said it's two soft brown leather bags, I said well, then you do have luggage. He indicated no, I don't." (J.A. 86). After approximately twenty minutes, Agent Kahn returned to the interview room.

Agent Kahn then advised Mr. Wechsler of his *Miranda* rights. Mr. Wechsler stated that he wanted to consult with an attorney before he answered any questions. (J.A. 87, 9293). The agents disregarded this request. The luggage which corresponded with Mr. Wechsler's claim tickets, and also bore his name, was found and brought to the room where Mr. Wechsler was being detained. Agent Kahn testified that:

> The first thing Mr. Wechsler - - he said before any questions were asked he said that's not my bags, those aren't my bags, something to that effect. At that point we asked Mr. Wechsler, would you mind if - - would you consent to us searching these bags. *He was like no. I don't want you to look in them. Then he said something to the effect of I don't want you to search them without a warrant.*. And then we asked him again, are these your bags. He said no. They're not my bags, I've never seen them before. Something to that effect. At which time we took the bags, removed the bags from the interview room.

Agent Kahn left the interview room to advise the Assistant United States Attorney, who had remained on the telephone, how Mr. Wechsler responded to these questions. (J.A. 74). Based upon this information, the assistant United States Attorney advised Agent Kahn to go ahead and open Mr. Wechsler's luggage without a warrant. (J.A. 88). The agents then proceeded to open the luggage by utilizing a key they had found hanging from one of Mr. Wechsler's carry-on bags. (J.A. 65, 89). One of the bags contained approximately 19 pounds of marijuana. At that point, Agent Kahn readvised Mr. Wechsler of his *Miranda* rights.

REASONS FOR GRANTING THE WRIT

A. The warrantless search of the luggage in which Mr. Wechsler retained a reasonable expectation of privacy violated the Fourth and Fourteenth Amendments of the United States Constitution.

Contrary to the weight of authority, the courts below concluded that Mr. Wechsler exhibited an intent to abandon his luggage merely by leaving the airport before retrieving his luggage from the airlines. The Circuit Court and the Court of Appeals held that this constituted a physical relinquishment of Mr. Wechsler's luggage. Courts outside the Commonwealth of Virginia have considered this same issue and have observed, to the contrary, that "[W]hen one leaves a suitcase in an airport baggage claim area, he leaves it in a place where there is normally some measure of security. It is reasonable to expect that checked luggage will be locked up, if not claimed within a reasonable time, and will be kept safe until the person holding the claim check comes to retrieve it." *United States v. Oswald*, 783 F.2d 663, 667 (6th Cir. 1986). Having possession of the claim tickets in his carry - on bag, along with the key to his checked luggage, Mr. Wechsler would, as the Circuit Court acknowledged, be able to return to the airport and take direct

control of his luggage later that day or the following day. (J.A. 123).

United States v. Sanders, 719 F.2d 882 (6th Cir. 1983), is instructive because it involved facts remarkably similar to those of the instant case. The defendant in *Sanders* aroused the suspicions of DEA agents during a layover in the Atlanta airport. *Id.* at 883. Agents in the Memphis airport, who had been notified of the investigation, observed the defendant walk past the baggage claim without claiming her suitcase and proceed outside where she entered a taxi cab. The agents asked the defendant to get out of the taxi. *Id.* at 884. Soon thereafter, the agents arrested the defendant and retrieved her suitcase. *Id.* at 884.

While the defendant refused to consent to a search, when asked whether the suitcase was hers, she responded, "It might be, and it might not." *Id.* at 885. Following a dog sniff, the suitcase was searched pursuant to a warrant and found to contain drugs. The government argued that the propriety of the stop was immaterial as the defendant abandoned her suitcase when she failed to claim it. *Id.* at 885. The *Sanders* court stated that leaving the airport without claiming one's luggage does not

constitute abandonment. *Id.* at 885 - 86. Moreover, the court held that, despite her equivocal assertion of ownership, the defendant never abandoned her suitcase.[3] *Id.* at 886.

Mr. Wechsler had likewise entrusted his luggage to the airlines' baggage claim cage, creating a bailor/bailee relationship, and it cannot be concluded that he intended to abandon his luggage, or relinquish possession of it, by leaving the airport. Mr. Wechsler's luggage was locked, and he kept the key in his possession. Having also retained his baggage claim tickets, Mr. Wechsler retained the legal right to return later to take direct control over his luggage. These acts are an effective expression of Mr. Wechsler's expectation of privacy. *United States v. Barry*, 853 F.2d 1479, 1482 (8th Cir. 1988). *See also United States v. Presler*, 610 F.2d 1206, 1213 - 14 (4th Cir. 1979) (reasonable expectation of privacy in briefcases entrusted to another where defendant locked briefcases and retained key).

The question therefore, is whether the Commonwealth of Virginia should stand alone and countenance the warrantless searching of luggage based on an abandonment theory when the

---

[3]She had paid cash for a one - way ticket to Memphis, had made reservations on two different flights, and had used fictitious call - back numbers and addresses. In addition, the defendant's checked suitcase smelled heavily of perfume, allegedly used by drug couriers to mask the odor of drugs.

luggage is locked and entrusted to an airline with the owner's identity properly displayed on the outside of the luggage, and the owner, for whatever reason, departs the airport in possession of the keys and claim tickets. Do those travelers who entrust their luggage to baggage claim services have an expectation of privacy no greater than if they had left their luggage unattended in an airport restroom simply because their destination is an airport in the Commonwealth of Virginia?

Mr. Wechsler asserts that the evidence adduced clearly shows that he never surrendered his reasonable expectation of privacy in his checked and locked luggage. The test for abandoned property accepted by the lower courts is as follows:

> A person's "[I]intent to retain a reasonable expectation of privacy" determines whether the property has been abandoned so as to permit its seizure without a warrant. Whether a person intends to retain a reasonable expectation of privacy in property is to be determined by objective standards. Such an intent may be inferred from words, acts, *and other objective facts.*

Commonwealth v. Holloway, 9 Va. App. 11, 18, 384 S.E.2d 99, 103 - 104 (1989)(citations omitted)(emphasis added). The objective facts in this case do not support the conclusion that Mr. Wechsler intended to abandon his luggage; rather, they are

consistent with an intent to retain a reasonable expectation of privacy in the luggage. These objective facts can be summarized as follows: (1) Mr. Wechsler was traveling under his real name and his luggage bore his real name; (2) Mr. Wechsler retained the key to his locked luggage; (3) Mr. Wechsler retained his baggage claim tickets; (4) Mr. Wechsler acknowledged that he had checked luggage; and (5) Mr. Wechsler refused to consent to a search of his luggage and insisted that the agents first obtain a warrant.

The evidence is anything but clear that Mr. Wechsler abandoned his checked and locked luggage. The one thing that is clear is that Mr. Wechsler told the agents that he did not want them to search his luggage without a warrant. (J.A. 42). The Court of Appeals, in finding that Mr. Wechsler voluntarily abandoned his luggage, overlooked this important and undisputed fact.

This is because the lower courts incorrectly determined that Mr. Wechsler had abandoned his luggage while en route to the police sub - station and failed to consider subsequent events. In determining whether property has been abandoned, "the relevant question . . . is intent *at the time of the search.*" *United*

States v. Moskowitz, 883 F.2d 1142, 1148 (2nd Cir. 1989) (emphasis added). Although, at first, Mr. Wechsler denied checking any luggage, prior to the warrantless search he admitted having done so. Moreover, at the time Mr. Wechsler's luggage was searched, he specifically stated that he did not consent to the search in the absence of a warrant. Any doubt as to whether he had abandoned his luggage was laid to rest when he refused to consent to a search of his luggage and insisted on a search warrant. This affirmative, unequivocal request that the agents obtain a warrant prior to searching the luggage cannot be ignored.[4] It is submitted that this Court should grant Mr. Wechsler's petition to consider whether Mr. Wechsler's assertion in combination with all of the other circumstances, demonstrates that he had a reasonable expectation of privacy in the luggage at the time of the search.

Mr. Wechsler's equivocal and contradictory denial of ownership, characterized by the Circuit Court as "mixed messages," may not be construed as abandonment. (J.A.163).

---

[4] The circuit court held that abandonment occurred during Mr. Wechsler's curb - side questioning. The circuit court's holding is erroneous because the last thing Mr. Wechsler said prior to being arrested and taken to the police sub - station was an acknowledgment that he did have checked luggage. (J.A. 36, 55, 85, 125).

See *United States v. Sanders*, 719 F.2d 882, 886 (6th Cir. 1983). While it is true that Mr. Wechsler at first denied ownership of any luggage, it quickly became obvious that he in fact had checked luggage when Agent Jacobson found two baggage claim tickets in Mr. Wechsler's hand - carried baggage that bore his true name. When confronted, Mr. Wechsler corrected his prior statement and admitted that he did, in fact, have checked luggage. This tangible evidence of ownership of luggage, along with his specific request that the agents obtain a search warrant prior to opening the luggage, was sufficient to overcome Mr. Wechsler's denial of ownership and any question of abandonment.

Despite the agents' efforts to bait Mr. Wechsler into abandoning his luggage, the totality of the circumstances demonstrate that Mr. Wechsler asserted an ownership interest in the luggage. Concerning Mr. Wechsler's refusal to consent to a search and demand a warrant, what more can a citizen do to demonstrate an expectation of privacy in his luggage? The search of Mr. Wechsler's luggage was illegal and the evidence should have been suppressed.

B. Before being searched, Mr. Wechsler was unlawfully detained in violation of the Fourth Amendment when, as Mr. Wechsler was leaving the airport and entering a taxi, the agent thrust his hand in between Mr. Wechsler and the interior of the cab, displaying his badge of authority, told Mr. Wechsler he was a DEA agent and said he wished to ask him some questions.

The stop of Mr. Wechsler violated the Fourth and Fourteenth Amendments and, therefore, any evidence obtained pursuant thereto should have been suppressed:

> Abandonment must be "truly voluntary and not merely the product of police misconduct," *United States v. Roman*, 849 F.2d 920, 923 (5th Cir. 1988). Therefore, a verbal disclaimer of an interest in a suitcase obtained from the defendant by the police during an illegal arrest, cannot be considered as *evidence of abandonment. Commonwealth v. Holloway*, 9 Va. App. 11, 19, 384 S.E.2d 99, 103 - 104 (1989) (citation omitted and emphasis added).

Mr. Wechsler was seized at the taxi within the meaning of the Fourth Amendment because "[w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S.1, 16 (1967). A "seizure" for purposes of the Fourth Amendment occurs when the "circumstances . . . amount to a show of official authority such that 'a reasonable person would have believed that he was

not free to leave.'" *Florida v. Royer*, 460 U.S. 491, 502 (1983) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The confrontation here involved more than a verbal request to halt - - Agent Kahn used his arm to physically obstruct Mr. Wechsler from entering the taxi cab, where he had already placed his carry - on luggage. (J.A. 106 - 107). No reasonable person would have believed themselves free to leave at this point. In *United States v. Goodina*, 695 F.2d 78 (4th Cir. 1982), another airport stop case, the Fourth Circuit held that a less forceful encounter amounted to a "seizure." There, the law enforcement officers also approached the defendant outside of Washington National Airport. Regarding the stop, the court found:

> Though not accompanied by force and carried out in a polite way, it was then prolonged through a preliminary request for identification which yielded nothing suspicious, through a direct inquiry of criminal culpability, into a request for permission to search after culpability had been denied. *Id.* at 82.

Based upon these facts, the district court's finding that a seizure had occurred was upheld. *Id. See also United States v. Wilson*, 953 F.2d 116, 123 (4th Cir. 1991) (holding that even though the

officer told the defendant he was free to leave, the officer's persistent questioning after the defendant attempted to cut - off conversation constituted a seizure).

Physical contact is not required in order for a restriction of movement to constitute a "seizure." In *Woodson v. Commonwealth*, 14 Va. App. 787, 421 S.E.2d 1 (1992), the police detective approached the defendant's parked car carrying his gun at his side. The detective identified himself as a police officer and said, "put your hands where I can see them." 149 Va. App. at 789, 421 S.E.2d at 2. This Court held that the detective's command, coupled with his announcement of authority, was a seizure because it "effectively prevented the occupants from leaving, thereby restricting their freedom of movement." 14 Va. App. at 791, 421 S.E.2d at 3. *See also Moss v. Commonwealth*, 7 Va. App. 305, 307, 373 S.E.2d 170, 172 (1988) (holding that a seizure occurred when the police officer stepped out from behind bushes and shined his flashlight at the defendant).

In Mr. Wechsler's case, the agents did not merely approach Mr. Wechsler and ask him if he would be willing to answer some questions. Agent Kahn actually restrained Mr.

Wechsler's freedom of movement and prevented him from entering the taxi cab. The inescapable conclusion is that the agents seized Mr. Wechsler.

To be consistent with the Fourth Amendment, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 440 (1980). The agents began to surveil Mr. Wechsler because he was a young black male who allegedly appeared nervous and had paid cash for a one-way ticket shortly before departure. The additional factors relied upon to justify stopping Mr. Wechsler were Mr. Wechsler's brief eye contact with the plain - clothed agents and his allegedly suspicious behavior near the baggage carousel. The information and observations were insufficient to give rise to a reasonable and articulable suspicion that Mr. Wechsler was engaged in criminal activity.

The primary characteristics relied upon by the agents to justify stopping Mr. Wechsler have been widely rejected by the courts. Nothing can be made of the fact that Mr. Wechsler purchased his airline ticket with cash. Agent Kahn testified that

drug couriers typically purchase airline tickets for cash so as not to leave a paper trail. (J.A. 23). The ticket purchase in this case was endowed with no such significance. Agent Kahn acknowledged that those who, like Mr. Wechsler, travel using their own names do not conceal their presence on a flight through cash ticket purchases. (J.A. 64). Regarding the same set of facts, the court in *United States v. Taylor*, 917 F.2d 1402 (6th Cir. 1990), observed:

> [D]rug couriers benefit from the anonymity of cash transactions. Here, however, Taylor [the defendant] purchased the ticket in his own name. *Certainly* purchasing a ticket under one's fecal name is uncharacteristic behavior for a *drug courier*. This casts further doubt not only on the officers' basis for stopping Taylor, but also on the reliability of the drug courier profile. *Id.* at 1410 n.11 (emphasis added).

This Court should discount this factor since Agent Kahn had no information that Mr. Wechsler was traveling under an alias and since he learned the converse was true prior to searching Mr. Wechsler's carry - on luggage. Mr. Wechsler's reported nervousness in the Dallas - Fort Worth Airport, another factor relied upon by the agents, is entitled to no weight. In *United States v. Taylor*, the agents concluded that the defendant fit the so - called "drug courier" profile because he appeared nervous

and did not stop at the baggage claim area. *Id.* at 1409. The court held that

> [T]his determination was inappropriate, because observing an individual walking quickly through an airport or nervously looking around is insufficient to warrant a search and seizure. *Id.* See also *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979) (nervousness in an airport is entirely consistent with innocent behavior).

Eye contact with surveilling law enforcement officers adds nothing to the supposition that an individual is engaged in criminal activity. In *Taylor v. Commonwealth*, 6 Va. App. 384, 369 S.E.2d 423 (1988), the Virginia Court of Appeals held that the fact that the defendants "cut their eyes" in the officer's direction could not contribute to a reasonable suspicion of criminality. 6 Va. App. at 389, 369 S.E.2d at 425. The court reasoned that:

> [T]he presence of an unidentified motor vehicle alternately tracking the defendants' vehicle from one side to the other for a period of four to five miles on an interstate highway could explain why the defendants, concerned for their own safety, looked in the officer's direction.

6 Va. App. at 389, 369 S.E.2d at 425. See also *Commonwealth v. Holloway*, 9 Va. App. at 16, 384 S.E.2d at 102 ("The mere

fact that travelers may look at each another does not justify a suspicion of wrongdoing."). This same reasoning applies in the instant case. Innocent travelers are likely to take notice of unidentified individuals who are staring at and following them. Here, it is not surprising that Mr. Wechsler, a young black male, noticed the two white males staring at him and following him from the gate to the baggage claim area.

The "slender reed" which remains and which cannot support this stop is the agents' surveillance of Mr. Wechsler once he reached the baggage claim area. According to the agents, Mr. Wechsler waited in the vicinity of the baggage carousel and, when the baggage from his flight was not quickly forthcoming, he attempted to make a phone call. Mr. Wechsler then exited the airport and hired a cab without waiting for the baggage aboard his flight to reach the carrousel. This conduct certainly fails to rise above an "inchoate and unparticularized suspicion or 'hunch.'" *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (quoting *Terry v. Ohio*, 392 U.S. at 27). Mr. Wechsler's behavior was not only lawful, it was consistent with the type of hurried and impatient behavior of lawful airline travelers who are in a rush. Without some evidence connecting Mr. Wechsler to drug

transportation, there was simply no basis for a suspicion that Mr. Wechsler was involved in criminal activity.

CONCLUSION

WHEREFORE, based on these facts and arguments, Mr. Wechsler prays that this Court grant his petition for writ of certiorari to consider the unlawfulness of his accosting and the subsequent warrantless search of his luggage.

Respectfully submitted,

William H. Murphy, Jr.
Counsel of Record
1007 North Calvert Street
Baltimore, Maryland 21202
(410) 539-6500

Attorney for Petitioner
Brian Wechsler

APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 11th *day of* April, 1995.

Brian Wechsler, s/k/a
Brian Weschler, Appellant,

against Record No. 1661-93-4
Circuit Court Nos. CR93-197 and CR93-388

Commonwealth of Virginia, Appellee.

From the Circuit Court of Arlington County

Before Judges Willis, Bray and Fitzpatrick

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgments appealed from. Accordingly, the judgments are affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the trial court.

A Copy,

Teste:

Richard R. James, Clerk

By: /s/ Cynthia L. McCoy

Deputy Clerk

Appellee's Costs:

Attorney's fee	$ 50.00
Appellee's brief	61.60

Teste: /s/ Cynthia L. McCoy

Acting Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 30th *day of* October, 1995.

Brian Wechsler, Appellant,

against Record No. 951220
Court of Appeals No. 1661-93-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk